Questions Submitted by the participants in IBTTA's June 29, 2012Teleconference on MAP-21, the recently approved highway program authorization. The questions posted below were solicited in advance and during the teleconference.

It is worth noting that though the legislation was signed into law on July 6th, many of the policy provisions apply to FY 2013 which begins on October 1, 2012. Further – many questions regarding program interpretations or implementation cannot be addressed well yet since the rulemaking and other administrative processes are still to occur.

We've tried our best to answer the questions posed as simply and clearly as possible – if you need further clarification or explanation please call Neil Gray at (202) 659-4620 ext. 14 or email: neilgray@ibtta.org .

Question 1 - It appears that the "90 days before construction" window to streamline TIFIA may be problematic for a number of reasons. Many project proponents want/need to know if TIFIA funding will be available well before they start construction as getting to a fully funded financial plan could well be dependent on having the benefits of TIFIA assistance. Additional clarification of what is intended, and whether the timelines are required or suggested would be helpful.

Answer: MAP-21 creates the following application process for TIFIA assistance (the bill refers to the process as a "rolling" application process:

First, the bill requires potential applicants to submit a letter of interest prior to an application for credit assistance. Included in letter of interest must be (1) a general description of the project, (2) a proposed financial plan, (3) a status of environmental review, and (3) information related to other TIFIA eligibility requirements.

Second, no later than 30 days after receipt an application, the Secretary must provide written notice to the applicant that either the application is "complete" or more information is required to complete the application.

Third, within 60 days of the receipt of this written notification, the Secretary must provide written notification that the application is approved or denied.

However, as part of the application itself – in order to be eligible for credit assistance - the applicant "shall demonstrate a *reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days* after the date on which a Federal credit instrument is obligated".

The conference report does not require that construction begin within 90 days. It does, however, require that the applicant demonstrate a *"reasonable expectation"* that the *contracting process* for construction can begin within 90 days of receiving the credit

assistance. Therefore, there is some subjectivity in this portion of the language and the Secretary would have to determine the eligibility of an application based upon this "reasonable expectation" requirement.

Question 2 - Is there any restriction noted on the duration of time between the two 90 day windows that were described?

Answer : I think the question being asked is: is there is a variance between the 90 day clock which starts on application and the 90 days to contracting – i.e. if approval is granted on day 45 of the application clock does contracting have to occur by day 135 or day 180? (90+90)). I believe this answer is unclear as noted in the final paragraph of the last answer.

Question 3 -My focus will be on the lane rehabilitation of existing lanes, and how that is not considered "conversion".

Answer : MAP-21 does allow for:

- reconstruction, resurfacing, restoration, rehabilitation, or replacement of a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel;
- reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;
- reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility;
- reconstruction, restoration, or rehabilitation of a highway on the Interstate System if the number of toll-free non-HOV lanes, excluding auxiliary lanes, after reconstruction, restoration, or rehabilitation is not less than the number of toll-free non-HOV lanes, excluding auxiliary lanes, before reconstruction, restoration, or rehabilitation

As such MAP-21 is identifying different levels of "conversion" – the first three bullets repeat existing language that allows the conversion of an entire bridge, tunnel or non-interstate highway from a fuel tax basis ("free") to a fully tolled facility. In the 4th bullet, only the newly constructed lane(s) can be tolled – not the entire roadway, though the revenues derived from the tolled lane can be applied to reconstructing, restoring and rehabilitating the entire roadway.

Question 4 -The interoperability language may be unattainable in four years, depending on what is meant.

Answer : Correct – MAP-21's language is simply a statement. It defines no authority for oversight (i.e. US DOT, FHWA), it requires no rulemakings, it offers no support or threats. But it does highlight an area of Congressional interest that could be enforced in future and it behooves the industry to take advantage of the opportunity to establish functional interoperability on our own terms before someone decides there should be a mandate for a technological and business rules "answer".

Question 5 -Audit provision and what it means.

Answer: Map-21 requires a public authority with jurisdiction over a toll facility to conduct an annual audit of the toll facility records to ensure adequate maintenance and compliance with the following uses of toll revenues:

- debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing;
- a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned;
- any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation;
- if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and
- if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title.

In addition, all records of the public authority pertaining to the toll facility must be made available ("on reasonable notice") to the Secretary for audit.

If the Secretary finds non-compliance on the use of toll revenues, the Secretary may require the public authority to discontinue collection of the tolls until an agreement is reached with the Secretary to achieve compliance.

Question 6 - What is the impact of the NEPA regulation changes contained within MAP-21 on projects already undergoing environmental study? For example, will the 139 L period change apply or will the SAFETEA-LU timeframe apply? In regards to the provisions on project acceleration and environmental studies, how may those be incorporated into ongoing studies?

Section 3 of MAP-21 states that unless otherwise specified, the effective date of any provision in the bill is October 1, 2012.

Question 7 - The Bingaman Amendment (if it survived) and changes to TIFIA.

Answer : The Bingaman amendments are not included in MAP-21.

There are many changes to the TIFIA program. The application process is mentioned above. Other changes include:

- Removal of selection criteria
- Use of a master credit agreement
- Amount of a secured loan may not exceed 49% of the eligible project costs (up from 33 percent previously)
- Allows for project "grouping" in order to meet project eligible project cost threshold
- Projects must meet creditworthiness standards
- Set-aside for rural infrastructure not to exceed 10% of the available funding.

Question 8 - It appears the conditions for tolling in Section 1512 have been relaxed from SAFETEA-LU (allowance for tolling new capacity on interstates, whole-scale tolling for reconstruction on bridges / tunnels, whole-scale tolling for reconstruction on non-interstates). However, the guidance on HOV conversions is less clear – at first glance, the provisions of 1512 (tolling without pre-determined limitations) seem to conflict with 1514 (prevent tolling of HOV's, defined as two-or-more people in 1512). Is there an IBTTA interpretation?

Answer: The bill makes a distinction and does not allow for the tolling of HOV vehicles on converted lanes.

Question 9 - It is my understanding that the new bill stipulates that environmental reviews must be completed within 270 days of publishing the project initiation notice in the Federal Register. Does the bill state what the consequences would be if the 270 day limit is missed? Also, are there any changes proposed to the NEPA process to help increase the likelihood that state DOTs can hit the 270 day target?

Answer: MAP-21 includes a number of changes to the environmental approval process (recall that the effective date unless otherwise stated is 10/1/12). Key among them the changes are:

- Expanded use of categorical exclusions
- Expanded delegation to the states of NEPA authority
- Early acquisition of real property prior to NEPA completion
- New issue resolution procedures that allow for elevation

- Resource agency deadlines for reviews
- Program to complete some ongoing EISs for complex projects with 4 years; only available for EISs that have been under way for at least 2 years
- Resource agency financial penalties for failure to meet deadlines
- Statute of limitations for judicial challenges is reduced from 180 days to 150 days
- Ability to issue combined FEIS and ROD

The financial penalties on federal agencies that fail to meet deadlines is a provision that may impact the likelihood of reviews meeting deadlines. However, recall that the past two multi-year federal transportation bills also attempted to "streamline" the environmental review process. It will be important to monitor the implementation of these provisions.

Question 10 - I actually have a general question on how the lobbying activity was carried out, also to compare it with what happens in the EU. For instance, are you in the US entitled as Association to take part in public consultations or Parliamentary hearings in order to express your concerns and thoughts about a specific legislation? In the EU we have this possibility and it would be interesting for me to know how this functions in US.

Answer: IBTTA is a registered lobbying entity - which means we file with the Congress noting any receipts we might receive in support of these efforts (usually none) and how much we spend (and on whom) in trying to make our case for broader tolling. We can and do seek opportunities to testify before the House and Senate – with Frank McCartney's participation in the House hearing last year being an example.

Moreover, is the Transportation Bill automatically and mandatorily applied in all the US States or is each State free to decide if apply it or not?

Answer: For certain legislative issues, usually safety related, there can be universal application of Federal law that can supersede state laws but in general the Federal highway program is money driven, in a carrots & sticks" model – where "carrots" are offered in the form of funding available for certain desired programs and "sticks" is the withholding of funding if you choose not to do that desired thing. The amount of funding available to each state involves a formula which relates, in part, to how much the state contributed to the Highway Trust Fund (guaranteeing that they receive 95% or more back).

In terms of tolling – any road in the country, except existing Interstate highways, can be tolled. Current Federal law states that as a basic principal – Interstate highways shall be "free". This is why we have focused so much on the two classes of toll pilot programs – one allowing conversion of existing "free" Interstate to tolled, and another program allowing 3 instances of newly constructed Interstate. Technically the Federal government

supplies a good deal of money to support transportation but they neither own nor operate any surface transportation facilities.

Question 11 - What exactly is a "rolling application process" for TIFIA? Are we going to continue to see periodic windows for submitting LOIs and/or applications instead of the continuous submission window that was contemplated in the senate version?

Answer: See TIFIA application process above (Question 1).

Question 12 - Related to above, the Senate version was pretty clear on pass-fail, evaluation criteria, and first-come, first-served for TIFIA. The conference committee version appears to have muddied the waters and allowed a lot of implementation discretion to the Secretary. The bill language does appear to be pass fail on very specific criteria that seem to be a relatively low hurdle vs. the previous specific and weighted scoring. What might this mean for implementation by the TIFIA JPO?

Answer: The drafters of the conference report intended for the language to reduce the subjectivity used by the DOT.

Question 13 - It appears that a minimum 10% of the credit subsidy budget authority is designated for rural projects (outside of urbanized areas of with a population >=250,000). Is that correct?

Answer: Not more than 10% of the TIFIA funding must be used to support rural infrastructure. If this 10% is not obligated by June 1 of that fiscal year for rural projects, than it can be used for non-rural TIFIA projects.

Question 14 - Is there any ability to pro-rate projects between urban and rural? For example, our alignment is 78% rural and 22% urban and on a cost basis, about 60% urban and 40% rural. There are obvious advantages to the rural designation, not the least of which is a 50% rate reduction off of the already low TIFIA rate.

Answer: The bill does not make a provision for pro-rating, but it is possible the Secretary could make such an interpretation. You may want to engage with DOT on this issue directly with the TIFIA JPO.

Question 15 - There is a provision for a project owner to apply ahead of the obligor being selected through a P3 procurement (which is the position our project is in with three short-listed teams and proposals perhaps 12 months out). Without a number of pieces in place, like a DB contract between the obligor and the design-builder, I see some challenges in obtaining an indicative rating opinion letter to go with an application ahead of a P3 obligor on board. Any thoughts about how to overcome those to meet the application requirements?

> **Answer**: There may be challenges to meeting these requirements in the case of a PPP procurement. You may wish to seek specific counsel on how best to structure an application in order to attain a rating opinion letter ahead of the PPP obligor being in place

Question 16 - The TIFIA JPO will need to revamp forms and process and adopt new regulations. Any speculations how long will this take before they are accepting LOIs and applications?

> **Answer**: Section 3 of the bill states that the effective dates (unless otherwise noted) of the policy changes will be October 1, 2012. It is possible that it may take longer for the JPO to be ready to accept applications and you may want to consult directly with DOT or watch for any implementation guidelines released by the Department.

Question 17 - With 49% participation in TIFIA eligible project cost, if there was $26 billion of pent up demand at 33%, which translates to around $38 billion under the new participation level (assuming everyone wants to max out). With a $1.75 billion of credit subsidy budget authority over 2 years, there appears to be sufficient capacity for just over 50% of the pent up demand, and this is only a two year authorization. (Just an observation – not a question)

Question 18 - The definition of "eligible project cost" does not seem to exclude TIFIA capitalized interest. This seems to be a change that would increase eligible project cost and increase the maximum TIFIA loan on a project, everything else being equal. Am I reading the provision correctly? Is that how the TIFIA JPO will implement?

> **Answer**: The definition of "eligible project cost" is: capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

Question 19 - The conference committee TIFIA provisions seem to have left much discretion to the Secretary for implementation compared to the Senate version they started with. Are subjective criteria like "livability" and "sustainability" that have led to an urban/transit bias and turned TIFIA into an executive branch earmark program going to survive with the latitude left to the Secretary? For example, in the last TIFIA LOI window, 2 or 3 of the five projects did not have significant private participation. How does a project make the invite list when it scores low or zero on what was a 20 point criterion?

> **Answer**: The staff on the conference committee was interested in reducing the subjectivity on the part of the Department in approving TIFIA applications. As always, we won't know the impact of their efforts until the applications are submitted under the new TIFIA program.

Question 20 - The TIFIA JPO does not have sufficient resources to dole out and administer effectively the previous $123 million of annual credit subsidy. How are they going to handle a program nearly 10 times as large?

> **Answer**: The Department is going to have to undertake a resource review and allocate personnel to implement the MAP-21 legislation. Under the TIFIA program, up to 0.50 percent of the funding available may be used for administrative purposes - which should help the JPO given the increased workload (this would translate to $37.5 million in FY2013 and $50 million in FY2014 – up from $2.2 million in FY2012).

Comment: I am glad to see they eliminated the 129 agreement. An agreement to follow the law that basically reiterated the law always seemed silly. It does not change the need to follow the law and invest any toll surplus into Title 23 eligible projects.

The Buy America provisions appear to have been tightened, closing any opportunity to bifurcate projects for federalization with respect to that provision. Am I reading that correctly?

Question 21 - Where can we see a copy of the current (final) version of the transportation bill?

Answer: It is posted on the IBTTA website – also here: http://thomas.loc.gov/cgi-bin/query/z?c112:h.r.4348.enr:

Question 22 - I haven't heard anything yet as to how the bill deals with allowing PPP's?

Answer: See question above on PPPs and best practices, model contracts etc

Question 23 - What is the recourse if States or regions refuse to engage in interoperability?

Answer: None has been established – earlier version of this language charged the US DOT with establishing and enforcing rules for national interoperability within a very short timeframe. The approved final language establishes no present authority for enforcement. Yet we need to remember this is only a short-term measure and Congress will return to this and other topics within 2 years. It would be in the industry's best interest to mutually pursue interoperability on our own behalf before Congress might return to the issue and establish stricter authority that could force changes not of your choosing on your agencies and businesses.

Question 24 - What happened to TIGER?

Answer: The TIGER program is included in the Senate's version of the FY2013 Transportation Appropriations bill. There is no TIGER program in MAP-21.

Question 25 - What about the restrictions on VMT? Vehicle Mile Taxes or Mileage Based User Fees?

Answer: Please see Question 35 & answer below re: Cravaak amendment.

Question 26 - How do we reconcile the bill's language about "technologies or business practices" which arguably include tolling by license plate image, with the fact that many toll agencies cannot toll based on images alone as this requires real-time processing of account status at the lane level, and the existing technology precludes this without significant infrastructure changes/investments? Can we read the bill more narrowly to be based on the use of technologies that meets the business requirements/performance standards of toll operators?

Answer: The first House approach to this topic was to propose that US DOT establish rules and mandate a technology to achieve national interoperability (without any acknowledgement of business rules). While EZ-Pass has a large footprint the political fallout of stipulating a change in technologies affecting 21 states using other technologies would be enormous. Similarly choosing any other region's technology would be equally disruptive. The logical path for US DOT would be to select a technology that disrupts everyone equally. None of this would have offered any Federal financial support for such changes. The final language reflects the efforts of IBTTA, the IAG and ATI in describing that business practices are as big, if not bigger issue than technology in achieving interoperability. Asking Congress to split hairs on technology runs the risk of reintroducing a technological mandate that no one will be happy with.

Question 27 - The 90 day rule for TIFIA is impossible to meet if revenue bond financing is part of financing packaging. We usually need to know many months ahead to know entire finance structure. Are we sure of interpretation?

Answer: See above explanation of TIFIA timelines.

Question 28 - Doesn't Section 129 already allow tolling to be added to previously non-tolled Interstate bridges and tunnels which need to be replaced or rehabilitated? Why is this section of the new bill needed?

Answer: Yes – this is a restatement of existing language which has been on the books since the 1980's. The first project taking advantage of the language is underway now (Scudder Creek – see below). Early efforts of the House Transportation Committee at drafting the multi-year bill were to look at old language that was obsolete or had been enacted but never applied. At that time this language would have fallen prey to such house-cleaning. Restating the language should have the effect of protecting this opportunity from such threats for a while.

The DRJTBC offered this comment:

> Scudder Falls Bridge is being rebuilt using this language – they are the first (DRTBA).In December 2009, the Commission voted to establish cashless tolling for the Scudder Falls Replacement Bridge.

The action was taken due to the absence of federal and state transportation support for the project and because it would have been unfair to apply the financial costs solely to motorists using the Commission's seven current toll bridges. The Commission has yet to establish was the toll rates will be for the new bridge. The Commission's current base toll rate for a passenger vehicle is $1.

Tolling at the new will be "cashless" or "all-electronic cashless tolling (AECT). With AECT, tolls will be collected electronically through the E-ZPass system or video capture and billing. **A conventional barrier toll plaza will not be built.** AECT allows motorists to travel at prevailing speeds without having to stop to pay the toll. Non-E-ZPass-equipped vehicles passing through the cashless toll system will be subject to video capture by the electronic equipment mounted on an overhead gantry. The DRJTBC will send a bill to the customer to collect the toll. Additional administrative fees -- will be applied to customers who do not use E-ZPass. (The DRJTBC has not yet established what the tolls or fee rates will be.)

Tolling will be in the southbound direction only (entering Pennsylvania). This one-direction toll collection is consistent with all other DRJTBC toll bridges crossing from New Jersey to Pennsylvania. Electronic toll equipment will be mounted on an overhead gantry structure that is on or adjacent to the new bridge on the Pennsylvania side of the bridge.

The Commission is a self-funded agency that receives no federal or state dollars or gasoline tax proceeds to supports its capital program or operations. The Commission moved to toll the Scudder Falls Bridge because it did not feel it would be reasonable or fair to expect the users of its other toll bridges to shoulder the entire financial burden of the capital improvements to the Scudder Fall Bridge, its nearby interchanges and the I-95 corridor. Over the years, users of the I-80 and I-78 bridges in particular have questioned the propriety of being charged a toll to cross those spans while I-95 motorists enjoyed a toll-free crossing supported, in part, by tolls collected at I-80 and I-78.

Tolling the Scudder Falls Bridge would ensure that its future users shoulder the cost burden of the project's significant transportation-infrastructure and safety improvements that will enhance motorist safety and provide new capacity to meet future traffic demands.

Question 29 - My question is: doesn't referring to the interoperability section as a positive action fail to acknowledge the negative impact on the operations of some of the membership, something IBTTA has already tried to avoid, and shouldn't you make that point to the call participants? Perhaps the following from MTA Bridges and Tunnels could be acknowledged.

The bill requires national interoperability in four years thru technology or business practices. For agencies who want to implement a technology solution, four years is too short a period of time given the number of technologies to test and integrate nationally (There are at least seven different toll collection technologies in current use.). It will therefore mean that toll agencies that have operating requirements that only technology can operate (lift a gate or read/write at entry and exit) will have to change their operations (in our case remove gates) and adopt workaround business practices to implement interoperability within this short timeframe. These workaround practices cannot ensure the same collection rate as technology and will mean a significant loss of toll revenue for these toll operators. At B&T, after gates are removed, we expect toll losses of approximately 3% of toll revenue per year, which is $45 million. This is money that we would no longer be able to provide support to mass transit. We are not alone in this impact. Within the E-ZPass Group alone, toll agencies that operate with gates or read/write entry/exit systems collect $4.6 billion in tolls annually that would be at risk for lower collection rates.

Answer: As stated in response to earlier questions- the initial stance of the House T&I Committee was to have;

- US DOT would establish rules and a technology to achieve national interoperability within 2.5 years.
- For purely political reasons it is unlikely that a mandated technology would be any one of the systems currently in use in the U.S.
- At no point was there ever any consideration of providing Federal funding for this process.
- Nor was there any special concern expressed about the cost and losses that would accrue to toll operators to provide this functionality.
- And finally – a clear insistence that "anything" affecting interoperability had to occur within "the life of the bill" (in this case two years).

Compared to these points the unfocussed and non-punitive nature of the MAP-21 language could be fairly deemed a positive improvement.

Question 30 - USDOT already has an interoperability rule.

Answer: This is true – SAFTEA-LU established a requirement that the USDOT establish rules requiring facilities operating with authority under section 1604 of SAFETEA–LU (Value Pricing Pilot Program; Express Lanes Demonstration Program; and the Interstate System Construction Toll Pilot Program) to use electronic toll collection (ETC) systems and to maximize their system's interoperability with other toll facilities allowing for and establishing interoperability.

The FHWA's rule, issued Oct. 2009 was highly unusual – the agency stated "FHWA does not believe that it can effectively establish a national standard at this time." (Emphasis added). The rule itself is worth reading (www.gpo.gov/fdsys/pkg/FR-2009-10-08/pdf/E9-24296.pdf)

Question 31 - Is there any time limit on the directive for US DOT to prepare best practices for PPP's?

Answer: The public-private partnership language in MAP-21 (Section 1534) requires the Secretary to do the following:

- compile and make available best practices for public agencies and public officials on how work with the private sector on the development, financing, construction and operation of a transportation facility (no timeframe for this task to be completed)
- provide technical assistance for public agencies regarding the use of PPPs – including technical assistance on whether the use of a PPP would "provide value" compared with traditional public delivery methods (this is an ongoing task)
- develop standard PPP transaction model contracts and encourage the use of these contracts by public agencies (these model contracts must be developed no later than 18 months after the date of enactment – 7/6/12)

Question 32 - I have read through section 1512. Not clear if Value Pricing Program will be able to remain or will be eliminated. Key question: will a state still be able to obtain permission to fully toll an interstate if that state was a Value Pricing qualified state under the prior pilot program.

Answer: MAP-21 is silent as it relates to the Value Pricing Pilot Program. The conference report does not repeal current law. We have been told that FHWA is currently interpreting that silence to mean that the program authority (not the funding) will continue. However, as always, we will want to see something official from the Department in the coming weeks to affirm this.

Question 33 - What does MAP-21 stand for?

Answer: It is MAP-21 – Moving Ahead for Progress in the 21st Century.

Question 34
I think some of your questioners were confusing the application processing deadlines with the project readiness 90-day provision. The latter is "aspirational" language again: The applicant shall demonstrate a *reasonable expectation* that the construction contracting process *can* commence within 90 days (emphasis added -- it's not an absolute deadline)…

Answer: Answered in previous question.

Question 35 - The Cravaack amendment is to the House 2013 Transportation Appropriations Bill and not the reauthorization Conference Report. Looks like the appropriations Bill passed the full House with the amendment. If the restriction stays in the Bill after Senate action and final passage, the question is how will it impact the funding in the authorization bill for studies that the MBUF Alliance has been pushing. I know MBUF is engaged.

Answer: MAP-21 does not contain funding for MBUF activities. The Cravaack amendment was added to the House Appropriations bill and if the amendment survives a conference with the Senate (which does not contain a similar provision at this time), then the Department would be unable to expend any funds on MBUF activities. The FY2013 Transportation Appropriations is not expected to be cleared until September or later.